

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Consumer and Government Affairs Bureau Seeks)	CG Docket No. 18-152
Comment on Interpretation of the Telephone)	
Consumer Protection Act in Light of D.C. Circuit's)	
ACA International Decision)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

To: The Commission

COMMENTS OF SYNIVERSE TECHNOLOGIES

Syniverse Technologies, LLC (“Syniverse”) hereby respectfully comments in response to the Federal Communications Commission’s (“Commission’s”) Public Notice in the above-referenced proceedings.¹ As the Commission takes a fresh look at some of its interpretations of the Telephone Consumer Protection Act (“TCPA”) in light of the D.C. Circuit’s recent decision in *ACA International v. FCC*,² the agency should seize the opportunity to establish a new safe harbor for callers that rely on reassigned number database tools. As Syniverse has previously explained, a properly designed safe harbor would help reduce unwanted calls by incenting callers to use currently available marketplace solutions to learn when a number has been reassigned.³

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, Public Notice, CG Docket Nos. 18-152, 02-278, DA 18-493 (rel. May 14, 2018) (“Public Notice”).

² *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (“*ACA Int’l*”).

³ See Comments of Syniverse Technologies, CG Docket No. 17-59, at 3 (filed Aug. 28, 2017) (“Syniverse Reassigned Number Database Comments”).

Such an approach would advance multiple Commission policy goals in a manner that comports with the Commission’s legal authority, as articulated by the D.C. Circuit.

I. THE COMMISSION SHOULD ADOPT A SAFE HARBOR FOR CALLS TO REASSIGNED NUMBERS THAT PROTECTS CONSUMERS AND CALLERS ALIKE

Unwanted calls are an intrusive problem, and the Commission is appropriately focused on stopping them. At the same time, however, the record previously developed before the Commission makes clear that well-meaning callers have faced unwarranted liability for calling numbers for which valid consent previously had been obtained.⁴ Indeed, as the Commission observed in March, “[c]onsumer groups and callers alike have asked for a solution to this problem.”⁵

In part to address this conundrum, in the *2015 TCPA Omnibus Order*, the Commission created a one-call safe harbor for calls to reassigned numbers.⁶ The Commission’s consideration of a safe harbor was a commendable approach to address the concerns about calls to reassigned numbers. An appropriately constructed safe harbor would serve to both (1) protect consumers in possession of recently reassigned numbers from unwanted calls, and (2) protect well-meaning callers intending to contact only those consumers who want (and have consented to) their calls.

The Commission’s one-call safe harbor, however, was not properly crafted. First, it failed consumers by not offering callers any real incentives to undertake good calling practices.

⁴ See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7999 ¶ 71 (2015) (“*2015 TCPA Omnibus Order*”) (discussing petitions and comments from Comcast, Consumer Banker Association, Rubio’s Restaurant, Inc., Stage Stores, Inc., and United Healthcare Services, Inc.).

⁵ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, CG Docket No. 17-59, FCC 18-31 ¶ 2 (rel. Mar. 23, 2018) (“*Second Robocall FNPRM*”).

⁶ *2015 TCPA Omnibus Order*, 30 FCC Rcd at 8009 ¶¶ 89-90.

Instead, it established an unworkable framework that threatened to chill calls and messages that consumers actually wanted and consented to receive.⁷ It also failed well-meaning callers, offering neither practical nor reliable relief from unwarranted TCPA liability.⁸ Thus, as described further below, the D.C. Circuit appropriately struck down the Commission’s one-call safe harbor approach. And yet, the court left the door wide open for a superior replacement.

As a result of the D.C. Circuit’s decision and as a matter of good policy, the Commission can and should take a different approach to a safe harbor for calls to reassigned numbers. Specifically, as Syniverse has urged previously,⁹ the agency should adopt a safe harbor for companies that rely on existing commercial solutions (such as Syniverse’s Phone Number Verification Service), but who may still inadvertently call a reassigned number. Such a safe harbor would encourage callers to take proactive measures to prevent inadvertent calls to reassigned numbers by rewarding them for doing so – thereby reducing the number of such calls overall.¹⁰ Moreover, as CTIA has explained, “a good faith caller should have greater certainty

⁷ See, e.g., Brief for Amicus Curiae CTIA the Wireless Association in Support of Petitioners at 12, *ACA Int’l*, No. 15-1211 (D.C. Cir. Feb. 24, 2016), 2016 U.S. D.C. Cir. Briefs LEXIS 23, at *29 (the Commission’s “treatment of calls and messages to reassigned and wrong numbers establishes an unworkable framework that chills the communications consumers consent to receive”).

⁸ See, e.g., *ACA Int’l*, 885 F.3d at 707 (noting that “a caller’s reasonable reliance on the previous subscriber’s consent would be just as reasonable for a second call”); see also Joint Brief for Petitioners at 51, *ACA Int’l*, No. 15-1211 (D.C. Cir. Feb. 24, 2016), 2016 U.S. D.C. Cir. Briefs LEXIS 25, at *71 (the one-call safe harbor “would arbitrarily impose liability for later calls *regardless* whether the first call provides any reason to believe the number has been reassigned” (emphasis in original)).

⁹ See generally Syniverse Reassigned Number Database Comments; see also Comments of CTIA, CG Docket Nos. 17-59, 02-278, at 6-9 (filed Aug. 28, 2017) (“CTIA Reassigned Number Database Comments”) (urging revisiting of the 2015 *TCPA Omnibus Order* and establishment of a safe harbor).

¹⁰ See Syniverse Reassigned Number Database Comments at 3; see also *Second Robocall FNPRM* ¶ 7 (“CTIA and others contend that if the Commission decides to address the reassigned

that they are in compliance under the TCPA when the caller takes reasonable steps to confirm prior express consent, including for example by using market-based TCPA compliance solutions[.]”¹¹

Importantly, commercial database solutions like Syniverse’s Phone Number Verification System are effective in identifying reassigned numbers and thus reducing the number of calls to such numbers. For one retailer, for example, Syniverse identified 17,000 numbers in the retailer’s database recycled per month.¹² And Syniverse is not the only solution provider in the market. By encouraging the use of these marketplace solutions through a properly constructed safe harbor, companies like Syniverse will have every incentive to vigorously compete, innovate, and improve comprehensive TCPA solutions for callers – solutions that, in turn, reduce the number of calls mistakenly made to consumers who do not want them.¹³

II. THE D.C. CIRCUIT *ACA INT’L* DECISION SUPPORTS COMMISSION ADOPTION OF A PROPERLY CONSTRUCTED SAFE HARBOR

The Commission has the authority to adopt a safe harbor for callers that rely on commercial database solutions – in a manner consistent with, and even encouraged by, the D.C. Circuit decision in *ACA Int’l* – based on the notion of “reasonable reliance.”¹⁴

numbers problem, it should adopt a safe harbor from TCPA violations for callers that use existing commercial solutions and thereby encourage broader adoption and improvement of those solutions.”).

¹¹ CTIA Reassigned Number Database Comments at 7.

¹² See, e.g., Syniverse, *Syniverse Phone Number Verification Service*, at 2 <https://www.syniverse.com/products-services/product/phone-number-verification> (last visited June 11, 2018).

¹³ See Syniverse Reassigned Number Database Comments at 2-3.

¹⁴ See Public Notice at 4 (asking whether the Commission should “maintain [its] reasonable-reliance approach to prior express consent”).

While the D.C. Circuit held that the Commission’s previous one-call safe harbor was arbitrary and capricious, the court’s decision actually supports the Commission’s authority to establish a safe harbor, as long as the safe harbor is crafted in a way that aligns with the court’s interpretation of the reliance expectations created under the TCPA.¹⁵ Indeed, the court expressly supported the Commission’s fundamental legal interpretation that “the TCPA anticipates the caller’s ability to rely on ‘prior express consent,’” interpreted to mean “reasonable reliance[.]”¹⁶ In this regard, the D.C. Circuit stated that “when a caller has no knowledge of a reassignment, the Commission understandably viewed the caller’s continued reliance on the prior subscriber’s consent to be reasonable.”¹⁷ Further, the D.C. Circuit signaled explicit support for a safe harbor based on the reliance of a database solution. According to the court, safe harbor proposals that envision consulting repositories of information about reassigned numbers “would naturally bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission’s principle of reasonable reliance.”¹⁸ Stated another way, a reassigned number safe harbor based on available commercial database solutions would be reasonable.

¹⁵ See, e.g., *ACA Int’l*, 885 F.3d at 692 (finding the Commission’s previous one-call safe harbor was arbitrary and capricious “at least as defended in the order”); *id.* at 707 (Commission gave no explanation of why reasonable-reliance considerations would support limiting safe harbor to just one call or message); see also, e.g., *id.* at 708 (noting a time-based safe harbor could provide an expanded opportunity to learn about a reassignment).

¹⁶ *2015 TCPA Omnibus Order*, 30 FCC Rcd at 8009-10 n.312.

¹⁷ *ACA Int’l*, 885 F.3d at 707 (internal quotations omitted); see also *id.* at 708 (noting that the Commission “embraced an interpretation of the statutory phrase ‘prior express consent’ grounded in conceptions of reasonable reliance”).

¹⁸ *Id.* at 709.

Accordingly, consistent with this guidance from the D.C. Circuit, the Commission has ample authority to adopt a new, market-driven safer harbor. Specifically, the agency can and should adopt a new safe harbor grounded in the “reasonable reliance” of callers who take measures to learn of reassignments via consultation of available commercial solutions. As described above, this would allow callers to rely on consent previously received in good faith for those few instances in which a reassigned number is called.

III. CONCLUSION

Syniverse respectfully urges the Commission to use this opportunity to adopt a market-based solution to unwanted calls, by establishing a new safe harbor for callers that rely on currently available reassigned number database tools. Such an approach would serve consumers and callers alike.

Respectfully submitted,

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